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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 541

MARTIN AKERSON, ET AL., *Petitioners,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The 1,853 petitioners represented herein respectfully pray that a writ of certiorari issue to review the action of the United States Court of Claims of May 13, 1966, granting the motion of the United States to dismiss the petitions filed in that court by these petitioners.

OPINION BELOW

The opinion of the Court of Claims is not yet reported. It is printed in the Appendix hereto, p. 1a, *infra.*

JURISDICTION

The Court of Claims on May 13, 1966, entered its opinion and judgment dismissing the actions filed in that court. On timely application, Mr. Justice White on July 30, 1966, signed an order extending the time in which to file this petition for writ of certiorari to and including September 12, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

1. Whether the several provisions of the United States Code, entitling retired personnel of the United States uniformed services to receive retired pay computed as a percentage of the pay they would be entitled to if on active duty in their retired grades, were modified or repealed by the Act of May 20, 1958, 72 Stat. 122, or remained in full force and effect until expressly repealed by the Act of October 2, 1963, 77 Stat. 210.

2. Whether an officer retired from a uniformed service prior to June 1, 1958, can be considered as other than "retired" on that date so as to be excluded from the right, recognized by Section 4(b) of the Act of May 20, 1958, 72 Stat. 122, to the computation of retired pay on the basis of the higher active duty pay scale established by that Act.

STATUTES INVOLVED

Act of May 20, 1958, 72 Stat. 128, Section 3 (37 U.S.C. § 232 note) and Section 4 (10 U.S.C. § 1401 note) provide in pertinent part:

> SEC. 3. (a) Notwithstanding any other provision of law, except sections 4 and 7 of this Act and subsection (b) of this section, the changes in

rates of basic pay made by this Act do not increase the amount of retired pay, retirement pay, retainer pay, or equivalent pay to which any person is entitled on the day before the effective date of this Act.

* * * * * * * * *

SEC. 4. (a) Except for members covered by section 7 of this Act and persons with two or less years of service for basic pay purposes who were retired for physical disability or placed on the temporary disability retired list, members and former members of the uniformed services who are entitled to retired pay, retirement pay, retainer pay, or equivalent pay, on the day before the effective date of this Act, shall be entitled to an increase of 6 per centum of that pay to which they were entitled on that date.

(b) Notwithstanding any other provision of law, a member of a uniformed service retired under any provision of law, or transferred to the Fleet Reserve or Fleet Marine Corps Reserve, on the effective date of this Act shall have his retired pay or retainer pay computed on the basis of the rates of basic pay set forth in the Career Compensation Act of 1949, as amended by this Act, or on the rates of basic pay set forth in the Career Compensation Act of 1949 on the day before the effective date of this Act, plus 6 per centum of that pay, whichever is greater.

Act of August 10, 1956, 70A Stat. 385, 10 U.S.C. (1958 ed.) § 6149, identified in the United States Code as having been repealed by the Act of October 2, 1963, 77 Stat. 214, the repeal being effective October 1, 1963:

"Except for officers whose retired pay is computed under the Pay Readjustment Act of 1942 (56 Stat. 359), the retired pay of each retired

officer of the Navy or the Marine Corps shall be computed on the basis of rates of pay provided by law, at the time of his retirement, for officers on the active list. If after the retirement of any such officer the rates of pay for officers on the active list are changed, the retired pay to which the officer is entitled shall be recomputed on the basis of the new rates."

[Similar statutes respecting the computation of retired pay for retired officers of the Army, Air Force, Coast Guard, Public Health Service, and Coast and Geodetic Survey appeared respectively in 10 U.S.C. (1958 ed.) § 3991; 10 U.S.C. (1958 ed.) § 8991; 14 U.S.C. §§ 231, 304, 423; 42 U.S.C. § 213(a)(4); 33 U.S.C. § 857(a). All of these have been repealed by the Act of October 2, 1963, 77 Stat. 214.]

STATEMENT OF THE CASE

The 1,853 petitioners herein are retired officers of the various military and uniformed services of the United States.[1] Of that number, 1,206 had honorably served and completed their active careers in the United States Army, 272 in the United States Navy, 240 in the United States Marine Corps, 18 in the United States Coast Guard, 12 in the United States Public Health Service, 160 in the United States Air Force, and 4 in the United States Coast and Geodetic Survey.

All of these petitioners, grouped according to the respective services from which they had retired, filed

[1] Some of these retired officers died after their claims arose. They are represented herein by their widows, executors, administrators or other legal representatives.

petitions in the Court of Claims.[2] The petitions sought recovery of additional retired pay for the period between June 1, 1958, and October 1, 1963, the precise amounts being subject to computation by the Comptroller General. The relevant facts revealed by these petitions may be summarized and restated as follows:

(1) All of the petitioners had retired from their respective services prior to June 1, 1958, and retained the status of retired officers on that date.

(2) Prior to June 1, 1958, each petitioner received retired pay computed as a percentage of the pay he would have received if on active duty in his retired grade, as provided by long-standing statutes. This meant, without exception, that each such retired officer benefited from any pay increase in basic pay given to an officer of like rank serving on active duty. Retired pay thus increased automatically and proportionately as basic active pay scales were increased. This method of computing retired pay, which had been in effect for nearly a century, had been set forth by Congress in a series of enactments applicable to the career retirees of the respective uniformed services. And petitioners claimed that these enactments had not been repealed or suspended but remained in effect throughout the 1958-1963 period in question, thereby forming the basis for the claims here asserted. See 10 U.S.C. (1958 ed.)

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[2] Seven petitions, raising the identical statutory issues, were filed in the Court of Claims on behalf of the seven groups of retired officers: No. 155-64, by the retired Army officers; No. 156-64, by the retired Navy officers; No. 157-64, by the retired Marine Corps officers; No. 158-64, by the retired Coast Guard officers; No. 159-64, by the retired Public Health Service officers; No. 160-64, by the retired Air Force officers; No. 161-64, by the retired Coast and Geodetic Survey officers. The seven cases were consolidated for determination and decision in the Court of Claims. See p. 1a, *infra*.

§ 3991 (Army); 10 U.S.C. (1958 ed.) § 6149 (Navy and Marine Corps); 10 U.S.C. (1958 ed.) § 8991 (Air Force); 14 U.S.C. §§ 231, 304, 423 (Coast Guard); 42 U.S.C. § 213(a)(4) (Public Health); 33 U.S.C. § 857 (a) (Coast and Geodetic Survey).

(3) On June 1, 1958, the Act of May 20, 1958, 72 Stat. 128, became effective. That Act provided, *inter alia,* new and higher scales of basic pay for officers on active duty in the various uniformed services, thereby increasing the scales as last set forth in the Career Compensation Act of 1949, as amended, 37 U.S.C. § 232, *et seq.* This increase would have meant, by application of the formulae established in the prior enactments of Congress, automatic increases in the amounts payable to the petitioners as retired pay. But Section 3(a) of this 1958 Act, one of the critical sections here in issue, provided:

> "Notwithstanding any other provision of law, except sections 4 and 7 of this Act and subsection (b) of this section, the changes in rates of basic pay made by this Act do not increase the amount of retired pay, retirement pay, retainer pay, or equivalent pay to which any person is entitled on the day before the effective date of this Act."

Section 4, which is the relevant reference in Section 3(a), in turn contained two subsections:

(a) Subsection (a) stated that, with certain exceptions not here applicable, "members and former members of the uniformed services *who are entitled to retired pay,* retirement pay, retainer pay, or equivalent pay, *on the day before the effective date of this Act,* shall be entitled to an increase of 6 per centum of that pay to which they were entitled on that date." [Emphasis added.]

(b) Subsection (b) stated that "[n]otwithstanding any other provision of law, a member of a uniformed service *retired under any provision of law . . . on the effective date of this Act* shall have his retired pay or retainer pay computed on the basis of the rates of basic pay set forth in the Career Compensation Act of 1949, as amended by this Act, or on the rates of basic pay set forth in the Career Compensation Act of 1949 on the day before the effective date of this Act, plus 6 per centum of that pay, *whichever is greater.*" [Emphasis added.]

(4) Beginning on June 1, 1958, and continuing until October 1, 1963, the various departments administering the retired pay programs computed the retired pay of each petitioner in accordance with Section 4(a) rather than Section 4(b) of the 1958 Act—*i.e.*, by using the basic pay rates set forth in the Career Compensation Act of 1949 and in effect the day before the effective date of the 1958 Act, plus 6% of that pay. This action thus disregarded the fact that petitioners remained retired members of the uniformed services on and after June 1, 1958.

(5) Petitioners claimed, on the other hand, that they were within the intendment of Section 4(b) of the 1958 Act, thereby entitling them to retired pay computed on the basis of the new and higher rate of basic pay established by the 1958 Act. The continuation of this formula, they asserted, was consistent with the fact that the statutes establishing that formula were not repealed until 1963.

(6) Petitioners' claims relative to the higher rate of retired pay were denied by the General Accounting Office, the Government's position being that the 1958 Act, in the quoted provisions, must be deemed to have repealed the long-standing enactments respecting the

formula for computing retired pay. The petitioners accordingly instituted these proceedings in the Court of Claims.

Thus the dispute before the Court of Claims centered upon the impact of the 1958 Act upon the pre-existing retired pay formula applicable to petitioners. The Government conceded that if the statutes setting out the formula, which automatically increased retired pay as the basic active pay scale increased, were still effective as to petitioners following the adoption of the 1958 Act, petitioners' claims here would be valid. But the Government's contention was that Section 3(a) of the 1958 Act operated to freeze the active pay scale in effect the day prior to June 1, 1958, the effective date of the 1958 statute, so that petitioners were deprived of having their retired pay computed on the basis of the new and higher basic active duty pay scale set forth in the 1958 Act.

Petitioners' claims cover the period between June 1, 1958, and October 1, 1963. On the latter date, the Uniformed Services Pay Act of 1963, 77 Stat. 210, became effective. That Act expressly repealed the various pre-1958 statutes which established the retired pay formula underlying petitioners' claims, statutes which the Government claimed had already been repealed in effect by the 1958 Act. Under the new statute, changes in retired pay for uniformed officers are no longer based upon the current basic active duty pay scale but rather upon the cost-of-living index prepared by the Department of Labor.

Since there were no factual issues involved, the Court of Claims disposed of the claims on the basis of the statutory arguments advanced by the Government in

its motion to dismiss. In granting that motion, however, the court conceded that "Either interpretation [of the 1958 Act] is possible; neither is completely satisfying." See Appendix, p. 4a, *infra*. And the court further stated that if the legislative intent was what the Government said it was "we would prefer to have a provision unencumbered by ambiguity." *Ibid.*

The Court of Claims not only granted the Government's motion to dismiss but denied petitioners' motion for summary judgment. Appendix, p. 12a, *infra*. The court stated (p. 11a, *infra*) that petitioners' "best argument" was that "until the enactment of the 1963 legislation the scheme under which they received retired-pay-based-on-active-duty-pay before June 1, 1958 remained in Title 10 of the United States Code." The court conceded that the 1958 legislation "made certain amendments to these sections in Title 10, indicating that Congress was aware of the apparent continuance of the prior scheme . . . but nowhere was there an express repeal of the Title 10 provisions. We do not know why Congress waited until 1963 to remove from the Code these Title 10 provisions." *Ibid.*

Finally, with respect to petitioners' claim that their equitable rights had been breached, the Court of Claims merged its denial of the contention with its rejection of a claim in contract that had been advanced in a companion case decided the same day, *Andrews, et al.* v. *United States,* Ct. Cl. No. 163-64. That opinion is reprinted in the Appendix hereto, p. 12a, *infra,* for the convenience of this Court.

REASONS FOR GRANTING THE WRIT

1. The Statutory Issue Here Involved Is of Extraordinary Significance, Being Intimately Related to:

(a) The incentive for career-long military service, one of the essential elements of our national defense; and

(b) The respect due the long-established will and practice of Congress.

Seldom does a problem of statutory construction reach this Court so overladen with considerations of national significance, in terms both of our country's defense capabilities and a century-old Congressional policy designed to implement those capabilities. Those considerations amply justify the exercise of this Court's certiorari powers to resolve what is a most perplexing statutory enigma, one which the Court of Claims found possible of diametrically opposite conclusions from reading the statute. And neither reading was found to be "completely satisfying."

In terms of the sheer numbers of men and the large amounts of money involved in these claims, the question posed has a universality warranting the attention of this Court. See *United States* v. *Zazove,* 334 U.S. 602, 613-614, fn. 17; *Patterson* v. *Lamb,* 329 U.S. 539, 541.[3] The 1,853 petitioners herein are but a small fraction of those affected directly and indirectly by the holding of the Court of Claims. More than 17,000

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[3] In the *Zazove* case, certiorari was granted to review an important question of statutory construction involving the veterans national life insurance program, where the potential liability of the Government "might well amount to billions of dollars."

Certiorari was granted in the *Patterson* case to review certain War Department regulations and practices "which have affected, and will hereafter affect, the status and claims of thousands of draftees of the First World War."

individuals who retired from life-long careers in the various uniformed services have claims paralleling those of the petitioners; and a rough estimate of the total dollar value of these claims would be no less than $25,000,000. But the general principles here at stake may fairly be said to affect, particularly in terms of incentive and morale, the literally millions of active and retired members of the uniformed services of the United States.[4] If the decision below does in fact constitute a misconstruction of the will of Congress respecting the computation of retirement pay then a grave disservice has been done to the reliance and confidence of all those who have devoted their careers to the national defense effort, as well as to the integrity of Congress.

But the importance of the statutory problem involves far more than large numbers of men or large numbers of dollars. One of the major purposes of providing retired pay for those who devote their lives to the uniformed services is to provide a reliable financial incentive to attract and maintain precisely that kind of devotion. From time to time there has been a critical officer retention problem confronting the military and uniformed services resulting from "an inadequate number of junior officers seeking career status beyond the period of their obligated service." S. Rep. No. 387, p. 3, 88th Cong., 1st Sess. And that retention problem is directly related to the national security, it being obvious that our defense capabilities are en-

[4] Department of Defense figures show that at the end of fiscal year 1958, when the instant claims arose, there were a total of 215,026 personnel retired from the Army, Navy, Marine Corps and Air Force. Of that number, 41,618 were listed as retired regular officers and 64,716 were listed as retired non-regular officers.

hanced by career-long retention of highly trained personnel. As was said in 1958 by the Joint Chiefs of Staff, quoted in S. Rep. No. 1472, pp. 1-2, 85th Cong., 2d Sess.,

> "The Joint Chiefs of Staff believe that there is a vital need to increase the overall attractiveness of the professional military career in relation to its civilian counterparts in private industry. It is believed that a program of long-range incentives designed to this end is a matter of highest priority in order to obtain the requisite high professional level in our military force."

Acting upon such advice Congress has resolved to establish a liberal retirement program to serve as a part of the necessary inducement for career-long service. Indeed, it did so as long ago as the Act of August 3, 1861, 12 Stat. 289, wherein Congress first provided a retirement pay system for the career officer directly related to the current active pay scale of the military services. That system remained as an integral part of the United States Code until 1963, when a cost-of-living-index standard was substituted as the primary means of computing changes in retired pay. Uniformed Services Pay Act of 1963, 77 Stat. 210.

Thus to raise questions concerning the very existence of the long-standing retired pay program for the five years preceding the 1963 enactment is to raise questions touching on very basic and very practical aspects of national security. If Congress did in fact retain the current basic active pay scale as the determinant of retired pay between 1958 and 1963, the duty to respect that legislative will is especially high. Courts are of course obligated in all situations "to give effect to the intent of Congress." *Flora* v. *United States,*

357 U.S. 63, 65. But when that legislative will deals with critical factors of national defense, the obligation can brook no slightest compromise; every possible step must be taken to insure that such intent is accurately discerned and effectuated.

By the same token, when Congress has legislated on such matters in a way that leaves confusion and doubt, as is apparent in this situation, the problems of statutory construction become peculiarly subject to judicial resolution. That confusion and that doubt unfortunately survive the efforts of the Court of Claims to make a satisfactory resolution. And since the monetary claims here involved can be pursued in no tribunal other than the Court of Claims, there will be no opportunity for other judges or other lower courts to attempt to resolve the statutory mysteries; and hence there is no possibility of conflicting decisions arising out of these statutory problems. Only the efforts of this Court at this time can supply the definitive analysis that the legislative words here involved so desperately need.

If the decision below be wrong—and the Court of Claims was frankly uncertain from its reading of the statutory language—then the wrong has most serious consequences. A desire of Congress respecting the maintenance of the national security will have been frustrated. And the thousands of retired personnel of the uniformed services, partly induced to give their careers to those services by the retired pay promises offered by Congress, will have been denied what is fairly due them. The impact of that frustration and that denial upon the morale and incentive of the countless active officers and upon the retention rate of the

various services, while difficult of measurement, will indeed be and already has been serious.

Since the Court of Claims opinion does not supply the convincing assurance that the Congressional will has been properly read or applied and since the basic considerations at stake are so related to the maintenance of the national security, review by this Court becomes essential.

2. Important Problems of Statutory Construction and Application Are Raised by the Decision Below

Viewed as a chapter in the never-ending process of interpreting and applying Congressional enactments, the decision below does indeed raise important questions as to the techniques appropriate for discovering the true legislative intent. The Act of May 20, 1958, is a significant part of the great complex of laws dealing with the retirement rights of careermen in the uniformed services. Yet it has been framed in language that the court below found capable of diametrically opposite constructions, thereby requiring the most careful use of judicial techniques for unraveling the confusion. Because the techniques used by the Court of Claims are so dubious and produce a result so at war with Congressional intent, it becomes necessary for this Court to reexamine both the mode and the result of the interpretation made by the court below.

A. The Critical Language of the 1958 Act

At the heart of the problem in this case are the provisions of Sections 3 and 4 of the 1958 statute. That problem and the differing constructions that may be made of those sections can be seen from the following:

Section 3(a)

Section 3(a) reads: "Notwithstanding any other provision of law, except sections 4 and 7 of this Act . . . the changes in rates of basic pay made by this Act do not increase the amount of retired pay, retirement pay, retainer pay, or equivalent pay to which any person is entitled on the day before the effective date of this Act." The effective date being June 1, 1958, the day before would be May 31, 1958.

The Government's version of this statutory language, which was adopted by the Court of Claims, is that (1) the opening phrase "Notwithstanding any other provision of law" operates to exclude and in effect repeal the operation of the pre-1958 statutes relating to the computation of retired pay, (2) the "except" clause as to Section 4 must be given effect as indicated below, and (3) since petitioners were entitled to receive retired pay on the day before the effective date of this Act, the last portion of the section means that they were not to receive any increase by virtue of the higher active pay scales established by the 1958 Act—thereby further indicating that the pre-1958 statutes, with their provision for automatic increases in retired pay proportionate to increase in the active pay scales, were no longer effective.

The petitioners' version of Section 3(a) is that (1) the opening "Notwithstanding" clause is necessarily modified by the "except" clause so that, if the pre-1958 formula for retired pay was still effective under the excepted Section 4(b), there had been no repeal or modification of that formula as to petitioners, and (2) the prohibition against increasing retired pay based on higher active pay scales does not apply to those who are within the scope of the excepted Section 4(b).

Section 4(a)

Section 4(a) reads: "... members and former members of the uniformed services who are entitled to retired pay ... on the day before the effective date of this Act, shall be entitled to an increase of 6 per centum of that pay to which they were entitled on that date."

The Government's version is that (1) petitioners, having retired prior to June 1, 1958, were among those "entitled to retired pay ... on the day before the effective date of the 1958 Act. Thus petitioners' ver- entitled to a cost-of-living increase of 6% in the pay to which they were entitled on that May 31 date, and no more, and (3) when read with Section 3(a), this section means that petitioners are not entitled to receive any additional increase under Section 4(b) by virtue of the higher active duty scale established by this Act. Thus the Government's version of Section 4(a) emphasizes the May 31, 1958, date in terms of one's eligibility for retired pay on that date.

The petitioners' version is that (1) Section 4(a) merely provides that "members and former members of the uniformed services" shall, as Congress intended, all receive a 6% cost-of-living increase in pay, and (2) this 6% increase, for purposes of computation, shall be based upon the pay received the day before the effective date of the 1958 Act. Thus petitioners' version emphasizes the 6% cost-of-living increase, the May 31 date having importance only in terms of making certain which basic pay was to be used in computing the 6%.

There is nothing in the language of Section 4(a), petitioners maintain, to suggest that all persons within its terms are necessarily excluded from the provisions

of Section 4(b). Indeed, since Section 4(b) refers in part to the right of *retired* members of the uniformed services to choose the 6% increase authorized by Section 4(a) there must be a degree of mutuality of coverage between the two subsections. If there is any exclusivity as to Section 4(a) it is in relation to those non-regular officers and personnel who cannot qualify as "a member of a uniform service retired" for purposes of Section 4(b).[5] To repeat, the critical element of Section 4(a) is its creation of a base on which to compute the 6% increase—which may or may not be utilized by those retired regular officers mentioned in Section 4(b).

Section 4(b)

Section 4(b) reads: "Notwithstanding any other provision of law, a member of a uniformed service retired under any provision of law . . . on the effec-

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[5] An officer cannot qualify as "a member of a uniform service retired" if he was commissioned as a non-regular officer and if, in retirement, he is not subject to military law, the dual compensation and conflict-of-interest laws, and other military disabilities. See *United States* v. *Tyler*, 105 U.S. 244, 246. The non-regular officer's eligibility for retired pay is controlled by the provisions of Chapter 67, 10 U.S.C. §§ 1331-1337, entitled "Retired Pay for Non-Regular Service." His non-active duty may be counted as service for purposes of computing his retired pay.

On the other hand, "a member of a uniform service retired" is one who was commissioned in the regular service, had career status, and upon retirement remains a "member" of that service, subject to all military laws and other disabilities.

Thus the words "member of a uniform service retired" in Section 4(b) are not synonymous with the words "who are entitled to retired pay" in Section 4(a). A person may be "entitled to retired pay" under 10 U.S.C. § 1331 without being a "member of a uniform service retired," and such a person's retired pay had never been subject to adjustment to reflect later changes in basic active pay scales.

tive date of this Act shall have his retired pay or retainer pay computed on the basis of the rates of basic pay set forth in the Career Compensation Act of 1949, as amended by this Act, or on the rates of basic pay set forth in the Career Compensation Act of 1949 on the day before the effective date of this Act, plus 6 per centum of that pay, whichever is greater."

The Government's version is that (1) the "Notwithstanding" phrase is another indication that the provisions of the pre-1958 statutes respecting retired pay are no longer applicable, (2) the phrase "member of a uniformed service retired under any provision of law . . . on the effective date of this Act" means only those who were on active duty through May 31, 1958, and who actually became retired on June 1, 1958, thereby excluding those like petitioners who became retired before that date, and (3) the choice between the two methods of computing retired pay simply does not apply to those who became retired before June 1, 1958.

The petitioners' version is that (1) the "Notwithstanding" clause has significance here only because it permits the choice of the 6% cost-of-living basic increase, which would otherwise be prohibited by the pre-1958 statutes still in effect, (2) the phrase "member of a uniformed service retired under any provision of law . . . on the effective date of this Act" refers to those members, like petitioners, having a status of retired officers on that date rather than to those who actually became retired on that date,[6] and (3) those

[6] This interpretation avoids the absurd result of the Government's interpretation whereby only those who actually retired on June 1, 1958, would be affected by Section 4(b). Actually only 8 Army officers retired as of that date. U.S. Army Register, Vol. 1, United States Army Active and Retired List (Jan. 1, 1963).

with retired status within the purview of this section are only those who were regular officers in the active service and who remain members of the service after retirement, and (4) the choice made available by the last part of Section 4(b) expressly recognizes the availability of the pre-1958 formula—*i.e.*, computing retired pay "on the basis of the rates of basic pay set forth in the Career Compensation Act of 1949, as amended by this Act." Petitioners' version thus emphasizes not the date of retirement but one's status as a retired officer on June 1, 1958. He is given an option to receive retired pay increases in accordance with the pre-1958 formula or the 6% increase computed on the rate of pay in effect on May 31.

These, in capsule form, are the competing interpretations of the relevant statutory language. Petitioners suggest that their interpretation is more in accord with a common-sense reading of the language and gives recognition to all provisions of law outstanding as of June 1, 1958, as well as the repealing provisions of 1963. And that interpretation is in accord with the basic rule of statutory construction that "our first reference is of course to the literal meaning of words employed," *Flora* v. *United States*, 357 U.S. 63, 65. When such a reference is made, much of the seeming ambiguity disappears, leaving little need to consult other evidences of legislative intent.

The numbers actually retiring from the other services as of that date would be even smaller. Certainly Congress did not write Section 4(b) for the benefit of this handful of individuals. Indeed, the Court of Claims stated that if Congress did intend to limit Section 4(b) to those who retire on June 1, 1958, "we would prefer to have a provision unencumbered by ambiguity." See p. 4a, *infra*.

The contrary interpretations of the Government and of the Court of Claims raise serious questions as to techniques for reading and collating a series of enactments and giving effect to express language of repeal. In the circumstances of this case, this Court should resolve the differences of opinion as to the meaning of such important Congressional enactments.

B. The Impact of the Unrepealed Statutes

The Court of Claims acknowledged (p. 11a, *infra*) that the pre-1958 statutes, expressly authorizing the computation of retired pay on the basis of the current basic active duty pay scale, were not removed from the United States Code until 1963. And the court further conceded (p. 11a, *infra*) that the 1958 Act made certain amendments to those earlier statutes, "indicating that Congress was aware of the apparent continuance of the prior scheme."

A substantial question is thereby raised as to whether, given ambiguity in the language of the 1958 Act, the clear and unrepealed provisions of the earlier statutes should be construed as an integral part of the 1958 statute—thereby helping to remove the seeming ambiguity in that statute. As was said in *District of Columbia* v. *Thompson Co.*, 346 U.S. 100, 114, "The repeal of laws is as much a legislative function as their enactment." And if Congress did not repeal the pre-1958 statutes until 1963, it would seem improper for the judiciary to consider those statutes repealed in 1958 by virtue of ambiguous legislative language.

The general rule here at stake is that expressed in *United States* v. *Borden Co.*, 308 U.S. 188, 198: "It is a cardinal principle of construction that repeals by

implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible." In this case it would appear quite possible, if not mandatory, to give effect both to the pre-1958 statutes and to the Act of May 20, 1958, without doing violence to any of those enactments. Indeed, to read the pre-1958 retired pay formula as an integral part of the alternative permitted in Section 4(b) of the 1958 Act is to remove at once much of the problem that plagued the Court of Claims, making clear and consistent what to that court seemed confused and inconsistent.

The failure of the Court of Claims to give effect to the pre-1958 statutes and to incorporate them as an integral part of the 1958 law, particularly Section 4(b) thereof, raises serious questions as to the techniques of properly construing a series of legislative enactments. Those questions deserve consideration by this Court.

C. The Congressional Intent

Concededly, the legislative history of a statute becomes of importance where its language is not free of ambiguity. *Steiner* v. *Mitchell,* 350 U.S. 247, 254. But "there is no need to refer to the legislative history where the statutory language is clear." *Ex parte Collett,* 337 U.S. 55, 61. And thus, if petitioners' analysis of the 1958 statute be accepted as correct, the logic of the language and of the statutory pattern makes unnecessary resort to legislative reports and debates. To that extent, an important question is raised by the decision below as to the propriety of referring to legislative history in the context of the statute in issue.

In any event, however, a serious problem is raised by the handling of the legislative history by the Court of Claims. A fair reading of that history, petitioners suggest, completely confirms their analysis of the statute and their contention that the pre-1958 statutes were not only incorporated in but reaffirmed by the 1958 statute. If petitioners be right, the Court of Claims has most grievously erred not only as to a matter of statutory construction but as to a matter of implementation of a legislative policy directly concerned with the national defense.

As to the critical question whether Congress intended to continue or repeal the pre-1958 statutes when it adopted the Act of May 20, 1958, the legislative history conclusively shows that Congress was both aware of those prior statutes and affirmatively desired to keep them in effect. In House Report No. 1538, pp. 71-75, 85th Cong., 2d Sess., accompanying H.R. 11470 (which evolved into the 1958 statute in question),[7] the House Committee on Armed Services specifically set out in parallel columns "the provisions of existing laws which would be amended by the various provisions of the bill." And included among the "existing laws" so amended were 10 U.S.C. (1958 ed.) § 3991 and § 8991—pre-existing statutes which set forth the retired pay formula here in issue. Very minor amendments were made to those provisions, indicating that, as the Court of Claims was forced to concede (p. 11a,

[7] The identical recognition of the continuing existence of the Title 10 provisions, with the amendments thereto noted in parallel columns, appears in S. Rep. No. 1472, pp. 64-65, 72-73, 85th Cong., 2d Sess., submitted by the Senate Committee on Armed Services.

infra), "Congress was aware of the apparent continuance of the prior scheme." [8]

Thus there is most convincing evidence that Congress intended to maintain the retired pay formula established prior to 1958 and to incorporate it where appropriate in the 1958 legislation. That incorporation, of course, is to be seen in the provision of Section 4(b) permitting retired officers to compute retired pay "on the basis of the rates of basic pay set forth in the Career Compensation Act of 1949, as amended by this Act"—the very formula established by the pre-1958 statutes.

With reference to the specific provisions of the 1958 Act here involved, the Senate Armed Services Committee Report (S. Rep. No. 1472, 85th Cong., 2d Sess.) made a summary analysis of Sections 3(a), 4(a) and 4(b)—quoted by the Court of Claims in its opinion, pp. 7a-8a, *infra*. That analysis plainly shows:

(1) The purpose of Section 3(a) was to continue the retired pay rates in effect prior to June 1, 1958, with certain exceptions "which increase or otherwise affect the rates of those currently retired." Thus there was explicit recognition that retired officers within the scope of Section 4(b) would receive increased retired pay, with no intimation that any prior laws were being repealed or suspended. Such a statement hardly

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[8] The Court of Claims also noted (p. 11a, *infra*) that references to the new 1958 statute appeared in the notes following 37 U.S.C. § 232 (1958 ed.) and 10 U.S.C. § 1401 (1958 ed.), "but nowhere was there an express repeal of the Title 10 provisions."

The Court of Claims, however, admitted it did not know why Congress waited until 1963 to repeal the Title 10 provisions. The answer would seem to be that Congress did not intend to repeal them prior to 1963.

supports a conclusion that Congress intended by Section 3(a) to wipe out century-old statutes.

(2) Section 4(a), consistent with petitioners' analysis, was said to provide "a 6 percent increase in retired pay to persons retired before the effective date of this act." This accords with the common understanding that this subsection grants in general terms the right to the general 6% cost-of-living increase.

(3) Section 4(b) was said to "affect only members who become entitled to retired pay under any provision of law . . . on the effective date of this act by providing that their retired pay or retainer pay be computed under the new rates of the bill or the old rates plus 6 percent, whichever is greater." This statement is fully consistent with the petitioners' analysis of the section. A member "entitled" to retired pay on June 1, 1958, plainly could have retired in fact prior to that date; and Congress was here indicating its desire to permit him to use the pre-1958 formula based upon the new active duty pay scale. The Committee's statement as to the need for Section 4(b) only confirms the continuing vitality of the pre-1958 retired pay formula, a statement which said that Section 4(b) was

> ". . . necessary because the existing language of several of the retirement statutes [i.e., the pre-1958 statutes in question] would otherwise require persons retired on the effective date of the act [i.e., on June 1, 1958] to have their rates computed under the old rates without the benefit of the 6 percent increase provided by subsection (a)."

In other words, the continued vitality of the pre-1958 statutes was such that an express exception thereto was necessary in order to permit retirees to choose the

alternative computation based on the old rates plus the 6% increase.

Petitioners suggest that there is thus nothing in the legislative history inconsistent with the interpretation that they believe is mandated by the statutory language. On the contrary, every indicia of Congressional intent seems to confirm that interpretation. As was explained during the course of the hearings before the House Committee on Armed Services,[9] the silence in the 1958 Act respecting express repeal of the pre-1958 statutes meant that "the new rates will apply" in computing retired pay for retired officers and that "retired people then . . . get increased retirement based on the new pay scales." Chairman Rivers of that Committee later told the House (104 Cong. Rec. 4711, March 25, 1958) that such "increased retirement benefits which are inherent in any pay increase" would help to create powerful career incentives and "will go a long way in helping to create the necessary body of career personnel our armed forces and our country so badly needs."

The failure of the Court of Claims to respect this legislative intent most certainly calls for the exercise of this Court's review powers.

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[9] Hearings before Subcommittee No. 2 of the House Committee on Armed Services on H.R. 9979, Method of Computing Basic Pay (March 7, 1958), p. 5591. The quoted remarks arose from a colloquy with Department of Defense experts in explanation to the Subcommittee of the provisions of the bill that later became the Act of May 20, 1958.

CONCLUSION

For nearly one hundred years and during the time that these petitioners rendered active duty service the right to receive retired pay computed on the basis of the current active duty pay was provided by clear Congressional mandate. As was said many years ago by Mr. Justice Johnson in *United States* v. *Heth,* 3 Cranch 399, 408:

> "... where an individual has performed certain services, under the influence of a prospect of a certain emolument, that confidence which it is the interest of every government to cherish in the minds of her citizens; a confidence which experience leaves no room to distrust in our own; would lead to a conclusion that it could not have been the intention of the legislature to defeat a reasonable expectation of her officer, suggested by her own laws. Unless, therefore, the words are too imperious to admit of a different construction, it will be gratifying to the court to be able to vindicate the justice of the government, by restricting the words of the law to a future operation."

Those sentiments, shared by the petitioners, appropriately underlie the reasons expressed herein as to why certiorari should be granted to review the judgment below.

Respectfully submitted,

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September 9, 1966

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

(Decided May 13, 1966)

No. 155–64

MARTIN AKERSON, ET AL.

v.

THE UNITED STATES

No. 156–64

WILLIAM W. AGNEW, JR., ET AL

v.

THE UNITED STATES

No. 157–64

WAYNE H. ADAMS, ET AL.

v.

THE UNITED STATES

No. 158–64

ROBERT L. ADDY, ET AL.

v.

THE UNITED STATES

No. 159–64

GORDON A. ABBOTT, ET AL.

v.

THE UNITED STATES

No. 160–64

ORVIL A. ANDERSON, ET AL.

v.

THE UNITED STATES

No. 161–64

LEE OTIS COLBERT, ET AL.

v.

THE UNITED STATES

Lawrence C. Moore, attorney of record, for plaintiffs. *Laurence H. Axman* and *Damon M. Gunn,* of counsel.

Arthur E. Fay, with whom was *Assistant Attorney General John W. Douglas,* for defendant. *Edgar H. Twine,* of counsel.

Before COWEN, *Chief Judge,* LARAMORE, DURFEE, DAVIS and COLLINS, *Judges.*

ON DEFENDANT'S MOTION TO DISMISS PETITIONS AND PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

LARAMORE, Judge, delivered the opinion of the court:

These consolidated actions are brought by some 1,800 plaintiffs to recover additional retired pay for the period June 1, 1958 to October 1, 1963. Each plaintiff is a retired officer, or legal representative of a deceased officer, of one of the Armed Forces, the Public Health Service or the Coast and Geodetic Survey. Prior to June 1, 1958, each officer represented here was receiving retired pay computed as a percentage of the "monthly basic pay" of his retired grade. See, *e.g.,* 10 U.S.C. § 3991 (Army), § 6325 (Navy), § 8991 (Air Force) (1958 Ed.). As a general rule, the retired grade was equivalent to the active duty grade held on the date of retirement, so each officer benefited from any pay increase given to an officer of like rank serving on active duty. See 10 U.S.C. § 3961 (1958 Ed.) (Army); Career Compensation Act of 1949, § 201, ch. 681, 63 Stat. 802, 805-807, as amended, 37 U.S.C. § 232(a) (Supp. IV, 1952 Ed.) (all services). In 1958, legislation was enacted which amended the Career Compensation Act of 1949. Act of May 20, 1958, 72 Stat. 122. Included in the new legislation were certain provisions relating to retirement pay which defendant interpreted as meaning that officers retired before the effective date of the Act were entitled only to their pre-effective date retirement pay plus

six percent. Sections 3-4, 6-7. Plaintiffs received retirement pay computed in this manner until October 1, 1963, when they became entitled to retirement pay based on the active duty pay rates that became effective on June 1, 1958. Uniformed Services Pay Act of 1963, § 5, 77 Stat. 210, 212-215. Plaintiffs concede that the 1963 legislation was prospective only; they base their claims on the 1958 legislation, alleging that it preserved the retirement-pay-based-on-active-duty-pay statute.

In support of its motion to dismiss, defendant argues that section 3(a) of the 1958 Act expressly prohibits the increased retired pay claimed by plaintiffs. Part of this argument is that section 4(b) does not except plaintiffs from 3(a)'s broad scope. Plaintiffs, of course, argue the contrary and have filed with their motion for summary judgment a long and confusing brief setting forth their answer to defendant's argument and making other arguments as well. We view the dispute over sections 3(a) and 4(b) as the primary issue.

The disputed sub-sections provide as follows:

> Sec. 3. (a) Notwithstanding any other provision of law, except sections 4 and 7 of this Act and subsection (b) of this section, the changes in rates of basic pay made by this Act do not increase the amount of retired pay, retirement pay, retainer pay, or equivalent pay to which any person is entitled on the day before the effective date of this Act.
>
> Sec. 4. (b) Notwithstanding any other provision of law, a member of a uniformed service retired under any provision of law, or transferred to the Fleet Reserve or Fleet Marine Corps Reserve, on the effective date of this Act shall have his retired pay or retainer pay computed on the basis of the rates of basic pay set forth in the Career Compensation Act of 1949, as amended by this Act, or on the rates of basic pay set

forth in the Career Compensation Act of 1949 on the day before the effective date of this Act, plus 6 per centum of that pay, whichever is greater.

Defendant's argument is quite simply that unless plaintiffs are excepted by section 4(b), their retirement pay must continue to be based on the "basic pay" rates in effect "before the effective date of this Act."[1] And the argument goes that section 4(b) cannot apply because plaintiffs were not "retired under any provision of law, or transferred to the Fleet Reserve or Fleet Marine Corps Reserve, on the effective date of this Act * * *." Plaintiffs argue that they were "retired * * * on the effective date of this Act." They point out that defendant's construction would limit section 4(b) to persons who actually retire on or become retired on the effective date of the Act which they say would be an absurd result. Either interpretation is possible; neither is completely satisfying. Thus, if defendant is correct, section 4(b) applies only to those persons who retire on June 1, 1958. If this is the legislative intent, we would prefer to have a provision unencumbered by ambiguity. If plaintiffs are correct, we would seem to be reading part of section 4(a) out of the statute. See footnote 1, *supra*. Only the legislative history can help us to carry out the purpose of the disputed provisions, and in this case the legislative history is very helpful indeed.

In recommending to the Senate that the 1958 military pay act be passed, the Committee on Armed Services reported

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[1] There is no question that the exception contained in section 4(a) applies to plaintiffs if section 4(b) does not. Section 4(a) entitles all members of the uniformed services who were receiving retired pay "on the day before the effective date of this Act * * * to an increase of 6 per centum of that pay to which they were entitled on that date." Plaintiffs received a six percent increase in retired pay under this section from June 1, 1958 to October 1, 1963, and claim the difference between this and what they would have received under section 4(b).

that legislation was needed "to establish a career force for the military services." The Committee prefaced the report with the following quote from the Joint Chiefs of Staff:

> The Joint Chiefs of Staff believe there is a vital need to increase the overall attractiveness of the professional military career in relation to its civilian counterparts in private industry. It is believed that a program of long-range incentives designed to this end is a matter of the highest priority in order to obtain the requisite high professional level in our military force. [S. Rep. No. 1472, 85th Cong., 2d Sess. (1958); 2 U.S. Code Cong. & Ad. News 2465 (1958).]

The report continued with a statistical survey which showed the low incidence of re-enlistment and the negative effect on military operations of the resulting shortage of experienced personnel. Under a heading entitled "Objective of the Bill" was the following statement:

> The basic objective of this legislation is to provide a military pay system designed to attract and retain qualified personnel for active career service. [2 U.S. Code Cong. & Ad. News 2467 (1958).]

In short, the Committee envisaged this as a bill to encourage able officers and enlisted men to stay in the uniformed services and to attract young men to become career officers and enlisted men.

Consistent with this purpose, the bill increased the basic pay which had previously been set by the Career Compensation Act of 1949, as amended, *supra*. The minimum increase was six percent. This reflected the "cost-of-living increase since the enactment of the previous military pay legislation in 1955." 2 U.S. Code Cong. & Ad. News 2473 (1958). The maximum increases were given to the higher ranking officers and enlisted men, "the aim • • • [being] to provide an incentive for young officers and enlisted men

to aspire to higher grades." 2 U.S. Code Cong. & Ad. News 2474 (1958). Immediately succeeding the discussion of the basic pay increases came the following explanation of the bill's effect on persons already retired:

> The bill as passed by the House provided in effect that members retired before the effective date of the act would receive a flat 6-percent increase except for those on the retired list in the grade of lieutenant general, or equivalent, or general, and equivalent.
>
> The Senate committee amended the House provision by deleting the language permitting those on the retired list in 3- and 4-star rank to recompute their retired pay under the new rates of the bill. If recomputation were permitted for these 2 ranks, it would result in an increase of 54 percent for those in the rank of general, or equivalent, and 39 percent for those in the rank of lieutenant general, or equivalent, as compared to a flat 6 percent for all others retired. The committee was of the opinion that it would not be equitable to permit two pay grades to recompute, with the resulting increases, as contrasted to the other ranks who are extended only a flat 6-percent increase.
>
> The Senate committee also added language which would (1) require at least 1 year of continuous active duty after recall from a retired status in order to recompute under the new rates of the bill; (2) require 2 years of continuous active duty in order to recompute under the rates of the bill for those who were recalled from a retired status in a higher rank received as a result of honorary promotions in the Navy and Marine Corps; *and (3) clarified the bill so as to make certain that those persons retiring on the effective date of the bill would retire under the new rates.* [Emphasis added.] [2 U.S. Code Cong. & Ad. News 2474-2475 (1958).]

This general statement was particularized in the sectional analysis of the bill. Following is the Committee's discussion of the provisions in dispute:

SECTION 3.—PROVISIONS RELATING TO THOSE RETIRED BEFORE EFFECTIVE DATE OF THE ACT

Subsection (a)—Continuation of present rates of retired pay for those currently retired

The purpose of subsection 3(a) is to continue the rates of retired pay in effect before the effective date of the act for persons retired or granted retired pay before that date. This subsection contains exceptions to other parts of the bill which increase or otherwise affect the rates of those currently retired.

* * * * *

SECTION 4

Subsection (a)—Six percent for those already retired

Section 4 provides a 6 percent increase in retired pay to persons retired before the effective date of this act. Certain exceptions are made in the case of persons covered by section 7 of this act and persons with 2 or less years of service for basic pay purposes who are retired before the enactment of this act for physical disability. This bill does not provide any increase for any persons with less than 2 years of cumulative service. Persons retired before the effective date of this act with that amount of service have been given a 6 percent increase under section 5 of the Career Incentive Act of 1955.

Subsection (b)—Persons retired on effective date of bill

This subsection would affect only members who become entitled to retired pay under any provision of law, or to retainer pay, on the effective date of this act by providing that their retired or retainer pay would be computed under the new rates of the bill or the old

rates plus 6 percent, whichever is greater. This provision is necessary because the existing language of several of the retirement statutes would otherwise require persons retired on the effective date of the act to have their rates computed under the old rates without the benefit of the 6 percent increase provided by subsection (a). [2 U.S. Code Cong. & Ad. News 2485-2486 (1958).]

Finally, in the Conference Report, the conferees discussed the Senate amendments to the House passed bill and noted that "[b]oth the House bill and the Senate amendment provided a 6-percent increase in retired pay for all individuals now on the retired list." Conf. Rep. No. 1701, 85th Cong., 2d Sess., p. 14 (1958); 2 U.S. Code Cong. & Ad. News 2493 (1958). Viewed *in toto*, the legislative history makes inescapable the conclusion that Congress intended to give officers retired before the effective date the six percent cost-of-living increase, and no more. See *Fagan* v. *Unitd States*, 149 Ct. Cl. 716, 732, 277 F. 2d 469, 478-479 (1960). And this is completely consistent with the announced purpose of the legislation. Congress wanted to upgrade the quality of career cadres. This purpose would not have been served by allowing persons already retired to benefit from the basic pay increase. Congress also wanted everyone to get a cost-of-living increase. This purpose was served by section 4(a) as to persons already retired. It is true, of course, that retirement is an important part of the overall incentive package for officers of the uniformed services, and that the 1958 bill would not provide as great an incentive without an increase in retirement pay commensurate with the basic pay increase. Congress evidently perceived this, because in subsections (b) and (c) of section 4 it extended to persons retiring on or after the effective date the benefits of the 1958 basic pay rates.

The post-enactment history rounds out the picture. In 1963, the Uniformed Services Pay Act was enacted to pro-

vide additional incentives to career servicemen. 77 Stat. 210. Another purpose was "to establish a more equitable basis for the adjustment of retired pay for service members after retirement." S. Rep. No. 387, 88th Cong., 1st Sess. (1963); U.S. Code Cong. & Ad. News 912 (1963). The House bill provided that persons who had retired prior to June 1, 1958 should be able to prospectively recompute retired pay under the 1958 pay scales and added to that a five percent cost-of-living increase. The Senate Committee on Armed Services recommended an amendment that limited the retired pay increase to the higher of the recomputed figure or the five percent. U.S. Code Cong. & Ad. News 914 (1963). The House receded, so the Senate amendment became the law. Section 5, 77 Stat. 210, 212-215. In proposing the amendment, the Committee reviewed the philosophy of using cost-of-living increases as the standard for retired pay increases, and noted that henceforth—after giving persons such as plaintiffs the "one-shot" opportunity to recompute on the 1958 active duty basic pay scales —retired pay increases would be geared *solely* to cost-of-living increases. Following is the Committee's commentary on the amendment:

> The 1958 Pay Act adopted the cost-of-living philosophy for retired pay increases in order to avoid extreme increases for some retired persons and little or no increases for others retired. It was the intent of this act that the element of cost of living should be the dominant consideration in authorizing retired pay increases. In order to reflect the increases in the cost of living which are applicable to all persons on the retired list, the percentage increase should be the same. The 1958 act granted a flat 6-percent increase to all retired persons except a 16- and 26-percent increase for those in three- and four-star rank, respectively. The higher percentage for these two grades was to permit the active duty supplement to be used for retired pay purposes.

Prior to 1958 the various pay acts permitted recomputation for those on the retired list in accordance with the newly enacted pay scales. Had this custom been continued in 1958, the higher ranking officers in the grades of lieutenant colonel and up would have received substantially larger increases than the 6-percent cost of living authorized. In order to provide a transition for those retired in the higher grades from the recomputation to the cost-of-living system, the committee does authorize recomputation under the 1958 scales. At the same time, these increases, ranging up to 45 percent over present retired pay and 74 percent over pre-1958 retired pay, appear ample as a transition provision.

There is the argument that recomputation plus 5 percent for this group would permit all persons (except those receiving pay under the old laws) to receive the same retired pay prior to the 1963 rates.

It should be observed, however, that there will be different rates of retired pay for persons of the same rank and service as a result of each new pay act. Implicit in the cost of living philosophy is the premise that a person's retired pay will be based on the active duty rate whenever he retired, to be increased thereafter in accordance with increases in the cost of living. In the future since persons will be retiring under different pay scales they will not receive initial retired pay of equal amounts. The action of the committee, therefore, is consistent with the cost-of-living philosophy in authorizing the minimum cost-of-living increase. In addition, it permits amounts above the cost-of-living increase as transition rates for the higher ranking officers who would have benefited more under recomputation in 1958. This provision also recognizes that, as in other retired systems, there will be a difference in retired pay rates with each pay act. [U.S. Code Cong. & Ad. News 932-933 (1963).]

Plaintiffs would have us disregard the legislative history or look to other history which includes statements in Congress. We do not agree that the words of the 1958 statute are so clear as to warrant disregarding the history. Furthermore, we think that the 1958 committee reports are the most reliable guide to Congressional intent in this case.[2] They are quite complete and make clear, at least to us, what Congress was trying to accomplish.

Plaintiffs' best argument is that until the enactment of the 1963 legislation the scheme under which they received retired-pay-based-on-active-duty-pay before June 1, 1958 remained in Title 10 of the United States Code. The 1958 legislation made certain amendments to these sections in Title 10, indicating that Congress was aware of the apparent continuance of the prior scheme. See, *e.g.*, Act of May 20, 1958, §§ 6, 11, 72 Stat. 122, 129-132 (1958). Reference to the new legislation was made in notes following 37 U.S.C. § 232 (1958 Ed.) and 10 U.S.C. § 1401 (1958 Ed.), but nowhere was there an express repeal of the Title 10 provisions. We do not know why Congress waited until 1963 to remove from the Code these Title 10 provisions. We think, however, that the 1958 legislation leaves no doubt that sections 3 and 4 governed plaintiffs' retirement pay. Both sections 3(a) and 4(b) start with the clause: "Notwithstanding any other provision of law * * *," and that means, notwithstanding the provisions in Title 10.

Plaintiffs have also argued that their contract rights have been breached.[3] In the related case of *Andrews, et al.*

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[2] We have quoted the 1963 Committee Report only to show what Congress in 1963 thought was the intent of Congress in 1958.

[3] Plaintiffs do not expressly argue, as do the plaintiffs in *Andrews*, that this alleged "denial of earned rights" contravenes their Fifth Amendment rights. Their argument seems to be that where there is ambiguity, a statute should not be read in a manner that "confiscates earned rights."

v. *United States*, Ct. Cl. No. 163-64, also announced today, we hold that similarly situated plaintiffs have no vested or contractual right which entitles them to recovery.

Plaintiffs received a six percent increase in 1958, and a substantial increase in 1963. The statute gives them no more. Plaintiffs' motion for summary judgment is denied. Defendant's motion to dismiss is granted, and plaintiffs' petitions are dismissed.

IN THE UNITED STATES COURT OF CLAIMS

No. 163-64

(Decided May 13, 1966)

CHARLES L. ANDREWS, JR., ET AL.

v.

THE UNITED STATES

Robert F. Klepinger, attorney of record, for plaintiff.

Arthur E. Fay, with whom was *Assistant Attorney General John W. Douglas*, for defendant. *Edgar H. Twine*, of counsel.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS and COLLINS, *Judges*.

ON DEFENDANT'S MOTION TO DISMISS PETITION AND PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

LARAMORE, *Judges*, delivered the opinion of the court:

The facts in this case are identical to those presented in *Akerson, et al.* v. *United States*, Nos. 155-64 to 161-64, this day decided. Plaintiffs are officers of the uniformed serv-

ices who retired prior to June 1, 1958. For the period from June 1, 1958 to October 1, 1963, they received retired pay based on the active duty pay scales in effect on May 31, 1958, plus a six percent cost-of-living increase. They claim for this period additional retired pay to be based on the active duty "basic pay" provided in the Act of May 20, 1958, 72 Stat. 122. Plaintiff's claim is not predicated on statutory interpretation as is the *Akerson* petition. Plaintiffs appear to concede that they received all to which they were entitled under the Act. They base their claim on a challenge to the constitutionality of those provisions of the 1958 Act and the Uniformed Services Pay Act of 1963, 77 Stat. 210, which prevent them from computing their retirement pay on the basis of the 1958 Act's basic pay scales. Defendant has filed a motion to dismiss the petition and plaintiffs have filed a cross-motion for summary judgment.

The essence of plaintiffs' argument is that the United States offered to each officer who performed satisfactory and honorable service for the required number of years "retired pay at the rate of 75% of active duty pay of his rank thereafter provided by Congress." Since each plaintiff accepted that "offer" and gave the United States the bargained-for performance, each plaintiff is entitled to the promised consideration. Under the plaintiffs' theory, both the 1958 and the 1963 Acts breach the contract and, therefore, are unconstitutional under the Fifth Amendment.

The difficulty with this position, as defendant points out, is that there is strong authority for the counter-proposition that officers have no vested or contractual right to any particular amount of retired pay. The general rule has long been that "[a] soldier's entitlement to pay is dependent upon statutory right * * * [and not upon] common-law rules governing private contracts * * *." *Bell* v. *United States*, 366 U.S. 393, 401 (1961). *Cf.*, *Leonard* v. *United States*, 279 U.S. 40 (1929); *United States* v. *McDonald*, 128 U.S. 471 (1888); *Byrd* v. *United States*, 103 Ct. Cl. 285

(1945); *Amchanitzky* v. *United States*, 81 Ct. Cl. 409, *cert. denied*, 296 U.S. 598 (1935); *Fulmer* v. *United States*, 32 Ct. Cl. 112 (1897); *Magaw* v. *United States*, 16 Ct. Cl. 3 (1880); *Lowry* v. *McCarl*, 79 F. 2d 144 (D.C. Cir. 1935); *Heidt* v. *United States*, 56 F. 2d 559 (5th Cir. 1932). And since the pay of officers in the uniformed services is within the exclusive control of Congress, it was free to limit the benefits of the 1958 active duty pay increase to members on the active duty list.

This is not a harsh result. Plaintiffs do not claim that they were singled out for special unfavorable treatment. They admit that they received a substantial pay increase of six percent. In the conclusion to their brief, they concede that "Congress acted entirely within its constitutional power" in passing the 1963 legislation which ended "[t]he century old tradition concept of retirement pay," but they argue that the new system is constitutional only as it affects newly commissioned officers who are now on notice. We fail to see how plaintiffs were hurt by either the 1958 or the 1963 legislation. They would have to concede that they would have no claim whatsoever under any of their theories had Congress not raised the active duty basic pay in 1958. So they have had to hitch their wagon to the star of those on active duty. No doubt retirees from all industries and professions wish they could benefit from the high pay scales of the recent boom years, but it is difficult to see how there could be any "right" absent an express contract. Congress evidently felt that it had to raise the basic pay to attract and retain competent officers and enlisted men. Of course, the reasons for raising retired pay were different, and it seems that the cost-of-living increase was a perfectly fair solution.

In summary, the petition fails to state a claim upon which relief can be granted. Defendant's motion to dismiss is granted. Plaintiffs' motion for summary judgment is denied. The petition is dismissed.